77-903

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1977

PATRICK MYERS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order of the Supreme Court of Illinois entered on June 1, 1977, which reversed the judgment of the Appellate Court of Illinois, First District and the Circuit Court of Cook County, Illinois and remanded the cause to the Circuit Court of Cook County with directions to deny the petitioner's motion to suppress.

JUDGMENT AND OPINIONS OF THE COURTS BELOW

The judgment of the Circuit Court of Cook County, Illinois, First Municipal District, was entered on May 27, 1974, without opinion and is not reported. The opinion of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County was filed on December 30, 1975, and is reported at 35 Ill.App. 3d 196, 340 N.E.2d 690. A copy of this opinion is set forth in the Appendix. The opinion of the Supreme Court of Illinois was filed on June 1, 1977, and is reported at 67 Ill. 2d 308, 367 N.E.2d 949. A copy of this opinion is also set forth in the Appendix.

JURISDICTION

The order of the Supreme Court of Illinois was entered on June 1, 1977, and a timely petition for rehearing was denied on October 3, 1977. The jurisdiction of this Court is invoked pursuant to Title 28, Section 1257, United States Code.

QUESTIONS PRESENTED

1. Was a warrantless opening and search of petitioner's luggage violative of his rights pursuant to the Fourth Amendment to the Constitution of the United States?

2. Is the opinion of the Supreme Court of Illinois in direct conflict with this court's opinion in *United States* v. *Chadwick*, ... U.S. ....., 97 S.Ct. 2476 so as to require reversal?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV, United States Constitution.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioner, Daniel Campbell and Michael Ward were arrested at O'Hare Field, Chicago, Illinois, on February 27, 1974, and charged with the offense of possession of marijuana in violation of Chapter 57½, Section 704, Illinois Revised Statutes C[1]2, C23, C46). The arresting officers had neither an arrest warrant nor a search warrant (R.[2] 8).

All three filed a motion to suppress evidence. The petitioner, in his motion, alleged that the search and seizure of the marijuana were in violation of his rights pursuant to the Fourth Amendment to the Constitution of the United States and Sections 6 and 10 of Article I of the Constitution of the State of Illinois (C. 30).

After an evidentiary hearing, the trial judge granted the motion to suppress on May 27, 1974 (R. 49).

The evidence at the hearing on the motion to suppress revealed that Special Agent Dale Anderson of the Federal

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[1] "C" refers to the Common Law Record filed with the court below.

[2] "R" refers to the Report of Proceedings filed with the court below.

Drug Enforcement Administration spoke with Special Agent Robertson of their San Antonio office at about 2:00 P.M. on February 27, 1974 (R. 11). Agent Robertson told Anderson that they had received information from Agent Nichols in El Paso that a Charles Ward had been stopped by the border patrol entering the country illegally from Mexico into the United States (R. 13). Upon questioning by the border patrol, it was learned that Ward had $2,700.00 in his possession, that he had been previously arrested in Brownsville, Texas for possession of marijuana, that he had hitch-hiked to Dallas and was going to take a plane to Chicago and then to Michigan. Ward was released and kept under surveillance.

Ward was then observed re-entering Mexico. His name was put on the "customs lookout system in Texas" and all law enforcement agencies were notified to be on the lookout for him should he return (R. 14).

Ward was next observed at a bus station in El Paso, Texas with two other individuals. Information was then received that Ward, Campbell and Myers boarded a bus in El Paso, Texas, travelled to San Antonio and then took Braniff Flight #58 scheduled to arrive in Chicago at 4:30 P.M.

Agent Robertson told Anderson that the three had eight suitcases and a foot locker in their custody (R. 15).

Anderson then notified his superior and the Chicago Police Department Vice Control Unit that there were three subjects coming to Chicago, and it was suspected that they had a quantity of marijuana in their luggage (R. 16). The canine unit of the Chicago Police Department was also advised, and two dogs and two dog handlers were

obtained in order to get probable cause to determine if there was, in fact, marijuana or drugs in the suitcases.

The dogs and their handlers were stationed behind the baggage retrievable area of Braniff Airlines at O'Hare Field which is a non-public area (R. 17, 30). The luggage from Flight #58 was then brought to that area and placed behind closed doors. Each dog was alerted to two suitcases.

The dog handlers advised Agent Anderson that the reaction of the dogs meant the presence of a marijuana-like substance in the suitcases.

Anderson observed Campbell and Myers claim the eight suitcases and the foot locker (R. 20). The luggage was placed on two wheel carts, and they walked to the upper level where they met Ward and then proceeded to the North Central ticket area. As they were about to check the luggage in at the North Central area, all three were placed under arrest for possession of a controlled substance (R. 21). Anderson then opened the two suitcases to which the dogs had alerted and found marijuana.

The other seven pieces of luggage were opened at the Vice Control Division Headquarters of the Chicago Police Department at 11th and State and were also found to contain marijuana (R. 27).

It was stipulated for purposes of the motion to suppress hearing that the dog handlers would testify that they had worked with these dogs on numerous occasions, that the dogs were specially trained for the purpose of detecting narcotics, that they were not used for other police work except narcotic investigations, and that the dogs' actions in the airport indicated to the handlers, based on their

previous experience with the dogs, that there was narcotics in the suitcases (R. 33-34, 37).

The trial judge granted the defendants' motions to suppress (R. 49). Thereafter, the preliminary hearing was held, and the court entered a finding of no probable cause (R. 51).

The respondent appealed the trial judge's ruling to the Illinois Appellate Court which affirmed his decision on December 30, 1975, and on June 1, 1977, the Illinois Supreme Court reversed the Illinois Appellate Court and remanded the cause to the trial court with directions to deny the motion to suppress.

REASONS FOR GRANTING THE WRIT

The Warrantless Search Of Petitioner's Luggage Was Violative Of His Rights Pursuant To The Fourth Amendment To The Constitution Of The United States. The Decision Of The Court Below Is In Conflict With This Court's Decision In United States v. Chadwick, ... U.S. ....., 97 S.Ct. 2476.

The factual situation in the case at bar is analogous to the facts present in this court's recent opinion in the case of *United States* v. *Chadwick*, ... U.S. ....., 97 S.Ct. 2476, decided by this court on June 21, 1977 and which was decided subsequent to the opinion of the Illinois Supreme Court entered in this case on June 1, 1977. The *Chadwick* decision, however, was called to the attention of the Illinois Supreme Court by way of a motion to cite additional authority in support of petitioner's petition for rehearing.

Like the *Chadwick* case, the luggage that was the subject of the motion to suppress in the case at bar was opened and searched after the petitioner and the others were arrested. Unlike the *Chadwick* case, however, two of the pieces of luggage were opened at the airport while the other seven pieces were opened at police headquarters in Chicago.

In its decision the Illinois Supreme Court erroneously concluded that the petitioner did not have a reasonable and justifiable expectation of privacy in the luggage.

> "Defendants also argue that the uninvited noses of the dogs have intruded into an area where they had a reasonable expectation of privacy (*Katz* v. *United States* (1967), 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507). But they do not explain in what manner the uninvited canine nose is more intrusive than the un-

invited human nose in the same location. More importantly, their argument fails since a protectable expectation of privacy must be reasonable and justifiable. (*United States* v. *White* (1971), 401 U.S. 745, 752, 28 L. Ed. 2d 453, 459, 91 S. Ct. 1122, 1126.) Their intent and efforts to so conceal and disguise the odor of the marijuana (which was itself contraband) that its presence in the luggage could not be detected simply does not meet this test. Nor can there be the same expectation of privacy in luggage checked on an airline as exists in one's home or private property. (*Cf. United States* v. *Johnston* (9th Cir. 1974), 497 F.2d 397.) A desire to conceal the odor of contraband hidden in a container exposed to the public is not, in our judgment, entitled to fourth amendment protections any more than is an analogous desire to conceal something in an open field (*Hester* v. *United States* (1924), 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445), in plain view (*Ker* v. *California* (1963), 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623), or otherwise exposed to an individual (*United States* v. *White* (1971), 401 U.S. 745, 28 L. Ed. 2d 453, 91 S. Ct. 1122) or the public (*United States* v. *Hufford* (9th Cir. 1976), 539 F.2d 32)." 67 Ill. 2d at 316, 367 N.E.2d at 953.

The Illinois Supreme Court also erroneously upheld the warrantless search in the case at bar on the theory that it was a "search incident to a lawful arrest."

> "Finally, it is argued that the warrantless search of the luggage at the airport, and the continuation of that search at the police station was impermissible. Not all warrantless searches are impermissible (*People* v. *Wiseman* (1974), 59 Ill. 2d 45, 48), and one of the exceptions is a search incident to a lawful arrest (*Chimel* v. *California* (1969), 395 U.S. 752, 763, 23 L. Ed. 2d 685, 694, 89 S. Ct. 2034, 2040; *Agnello* v. *United States* (1925), 269 U.S. 20, 70 L. Ed. 145, 46 S.

Ct. 4; *People* v. *Williams* (1974), 57 Ill. 2d 239, 243 *cert. denied* (1974), 419 U.S. 1026, 42 L. Ed. 2d 302, 95 S. Ct. 506). The scope of such a search includes the person of the defendant and the area within his immediate control (*Williams; People* v. *Perry* (1971), 47 Ill. 2d 402), and this search falls within this definition (*United States* v. *Edmonds* (2d Cir. 1976), 535 F.2d 714, 720; *United States* v. *Frick* (5th Cir. 1973), 490 F.2d 666, 669, *cert. denied* (1975), 419 U.S. 831, 42 L. Ed. 2d 57, 95 S. Ct. 55; *People* v. *McGowan* (1953), 415 Ill. 375, 382; *State* v. *Culver* (Del. 1972), 288 A.2d 279, 283; *People* v. *Perel* (1974), 34 N.Y.2d 462, 315 N.E.2d 452). Additionally, the marijuana for which the police searched the luggage was directly involved in the offense. This contraband was without question a proper object of search by the police. (*United States* v. *Edwards* (1974), 415 U.S. 800, 805, 39 L. Ed. 2d 771, 777, 94 S. Ct. 1243, 1238; *People* v. *Palmer* (1976), 62 Ill. 2d 261, 263; *People* v. *Jeffries* (1964), 31 Ill. 2d 597, 601; *People* v. *Van Scoyk* (1960), 20 Ill. 2d 232, 235; *People* v. *Tillman* (1953), 1 Ill. 2d 525, 532.) Similarly, "[i]t is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." (*United States* v. *Edwards* (1974), 415 U.S. 800, 803, 39 L. Ed. 2d 771, 775, 94 S. Ct. 1234, 1237; *Chambers* v. *Maroney* (1970), 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975); *United States ex rel. Muhammad* v. *Mancusi* (2d Cir. 1970), 432 F.2d 1046, *cert. denied* (1971), 402 U.S. 911, 28 L. Ed. 2d 653, 91 S. Ct. 1391; *United States* v. *Robbins* (6th Cir. 1970), 424 F.2d 57, *cert. denied* (1971), 402 U.S. 985, 29 L. Ed. 2d 151, 91 S. Ct. 1674; *People* v. *Wiseman* (1974), 59 Ill. 2d 45, 49; *People* v. *Canaday* (1971), 49 Ill. 2d 416, 421.) The ultimate test, of course, is the reasonableness of the search which was made, not whether the officers could have secured a warrant, and we find no unreasonable conduct here. (*Cardwell* v. *Lewis* (1974), 417 U.S.

583, 595, 41 L. Ed. 2d 325, 338, 94 S. Ct. 2464, 2472; *United States* v. *Edwards* (1974), 415 U.S. 800, 807, 39 L. Ed. 2d 771, 777, 94 S. Ct. 1234, 1239; *People* v. *Wright* (1969), 42 Ill. 2d 457, 460; *People* v. *Jones* (1967), 38 Ill. 2d 427, 434.) Rather, we believe the conduct here constituted commendable police procedure." 67 Ill. 2d at 318-319, 367 N.E.2d at 954-955.

Both of these conclusions of the Illinois Supreme Court are in conflict with this court's opinion in *Chadwick* wherein it was stated:

"The factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker. Luggage contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is luggage subject to regulated inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. In sum, a persons' expectations of privacy in personal luggage are substantially greater than in an automobile.

Nor does the footlocker's mobility justify dispensing with the added protections of the Warrant Clause. Once the federal agents had seized it at the railroad station and had safely transferred it to the Boston federal building under their exclusive control, there was not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained. The initial seizure and detention of the footlocker, the validity of which respondents do not contest, were sufficient to guard against any risk that evidence might be lost. With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.

Finally, the Government urges that the Constitution permits the warrantless search of any property in the possession of a person arrested in public, so

long as there is probable cause to believe that the property contains contraband or evidence of crime. Although recognizing that the footlocker was not within respondents' immediate control, the Government insists that the search was reasonable because the footlocker was seized contemporaneously with respondents' arrests and was searched as soon thereafter as was practicable. The reasons justifying search in a custodial arrest are quite different. When a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless "search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Chimel* v. *California,* 395 U.S., at 763, 89 S.Ct., at 2040. See also *Terry* v. *Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

Such searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. The potential dangers lurking in all custodial arrests make warrantless searches of items within the "immediate control" area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved. *United States* v. *Robinson,* 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); *Terry* v. *Ohio, supra.* However, warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest," *Preston* v. *United States,* 376 U.S., at 367, 84 S.Ct., at 833, or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not

immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." ..... U.S. at page ....., 97 S.Ct. at pages 2484-2485.

See also Footnote 8 wherein this court stated:

"Respondents' principal privacy interest in the footlocker was of course not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement with respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private." ..... U.S. at page ....., 97 S. Ct. at page 2485.

In Footnote 2 of the concurring opinion this Court stated:

"When Machado and Leary were 'standing next to [the] open automobile trunk containing the footlocker', and even when they 'were seated on it,' post, at 2489-2490, it is not obvious to me that the contents of the heavy, securely locked footlocker were within the area of their 'immediate control' for purposes of the search incident to arrest doctrine, the justification for which is the possibility that the arrested person might have immediate access to weapons that might endanger the officer's safety or assist in his escape, or to items of evidence that he might conceal or destroy. I would think that the footlocker in this case hardly was '"within [respondents'] immediate control"—construing that phrase to mean the area from within which [they] might gain possession of a weapon or destructible evidence.' *Chimel* v. *California*, 395 U.S. 753, 763, 89 S.Ct. 2034, 2040, 23 L.Ed. 2d 685 (1969)." ..... U.S. at page ....., 97 S.Ct. at page 2486.

The fact that two of the pieces of luggage were seized and opened at the airport does not distinguish the case at bar from the *Chadwick* case for the reason that once the luggage was seized by the law enforcement agents at the airport after the petitioner and the others were taken into custody, there was no longer any danger that they "might gain access to the property to seize a weapon or destroy evidence." Therefore, the search of the two pieces of luggage at O'Hare Field and the seven pieces at police headquarters in Chicago was no longer an incident of petitioner's arrest inasmuch as the luggage was not then within his "immediate control", that is, in an area from which he "might gain possession of a weapon or destructible evidence."

The record of the case at bar also fails to show that the search of the luggage was justified by any exigency. Since no exigency was shown to support the need for an immediate search and the property to be searched was under the exclusive dominion of police authority, the petitioner was entitled to the protection of the Warrant clause of the Fourth Amendment before his privacy interests in the contents of the luggage was invaded. See *United States* v. *Chadwick*, ... U.S. at page ....., 97 S. Ct. at page 2486.

CONCLUSION

WHEREFORE, for the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois should be granted.

Respectfully submitted,

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APPENDIX

61036)
61037) Consolidated
61038)

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,

v.

DANIEL CAMPBELL, PATRICK MYERS and MICHAEL WARD,
Defendants-Appellees.

Appeal from the Circuit Court of Cook County.
JAMES E. MURPHY, J.

MR. JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT:

Daniel Campbell, Patrick Myers and Michael Ward were arrested for the possession of marijuana at O'Hare International Airport, Chicago, soon after their arrival on a commercial airline flight from San Antonio, Texas. Their luggage was searched, marijuana was found and they were charged with the knowing possession of the drug in violation of section 4 of the Cannabis Control Act. Ill. Rev. Stat., 1973, ch. 56½, par. 704. Prior to trial they filed separate motions to suppress the seized evidence. The State has appealed from the trial court's order granting each motion. Ill.Rev.Stat., 1973, ch. 110A, par. 604(a)(1).

At the hearing on the motions, Dale Anderson, a special agent assigned to the Chicago office of the Federal Drug Enforcement Administration, testified that about 2:00 P.M., on February 27, 1974, he received a telephone message from Agent Robinson of the administration's San Antonio office that three men suspected of having marijuana in their possession had boarded a plane for Chicago. Robertson gave Anderson the following background in-

formation: the San Antonio office had been informed by Agent Nichols of their El Paso office that Ward had been stopped at the Texas border after having entered the United States illegally from Mexico. Ward, who had been arrested previously in Brownsville, Texas, for possessing marijuana, had $2,700 on his person; upon questioning him it was learned that he planned to take a plane to Chicago and then go on to Michigan. Released, but kept under surveillance, Ward was next observed re-entering Mexico. His name was placed on the United States Customs "look-out" system so that various law enforcement agencies would be alerted should he attempt to return. He was next seen at a bus station in El Paso in the company of two other men who were subsequently identified as the defendants Campbell and Myers. The men, with eight suitcases and a footlocker, boarded a bus bound for San Antonio. Upon their arrival in San Antonio they were kept under observation, and Robertson said they took Braniff flight #58 which was scheduled to arrive in Chicago at 4:30 P.M. that afternoon.

Anderson notified the Chicago Police Department that three men were coming to Chicago who were suspected of carrying marijuana in their luggage. Two dogs, trained in narcotics detection, were placed at Anderson's disposal by the department's Vice Control Unit. The dogs and their handlers were stationed in a non-public area in back of the Braniff Airlines' luggage retrievable conveyors at O'Hare. The luggage from flight #58 was brought to that area and the dogs were allowed to sniff all of it. Ward, Campbell and Myers had been observed disembarking from the plane, but neither Anderson, nor Donald Senece, the officer in charge of the vice control detail, nor the policemen handling the dogs, knew what suitcases belonged to them. Independent of each other, the dogs reacted vigorously to two suitcases—a reaction which their handlers told Anderson and Senece was caused by the scent of marijuana emanating from the suitcases.

All the luggage was then released. Campbell and Myers claimed nine pieces including the two suitcases the dogs

had attacked. They loaded the baggage on two carts and wheeled them to an upper level of the airport where they met Ward. The three men then walked to a North Central Airlines ticket counter. As they were about to check the eight suitcases and the footlocker into North Central, they were arrested by Senece. The suitcases that had received the dogs' positive response, and which still bore traces of saliva, were opened and searched. Marijuana was found in them, as it was in the remaining seven pieces of luggage when they were opened later at the headquarters of the Vice Control Unit.

Since the search of the two suitcases was made without a warrant, its validity can be sustained only if the arrests preceding it were legal. *Chimel* v. *California* (1969), 395 U.S. 752. Two components must be considered in determining whether there was probable cause to arrest the defendants: the information the Chicago law enforcement authorities received from their counterparts in Texas and the information conveyed to them by the dogs' reaction to the suitcases. A warrantless arrest is proper if the arresting officer has reasonable grounds to believe that the person he is about to arrest has committed or is committing a criminal offense. Ill.Rev.Stat., 1973, ch. 38, par. 107-2(c); *People* v. *Wright* (1969), 42 Ill.2d 457, 248 N.E. 2d 78. The reasonableness of the arrest must be determined by the knowledge and information possessed by the police officer at the time the arrest is made. *People* v. *Clay* (1973), 55 Ill.2d 501, 304 N.E.2d 280. The test is whether the facts and circumstances known to the officer warrant a prudent man in believing an offense has been committed. *Henry* v. *United States* (1959), 361 U.S. 88. An arrest cannot be based on mere suspicion (*People* v. *Marino* (1970), 44 Ill.2d 562, 256 N.E.2d 770), but in determining if probable cause exists courts deal with probabilities and act upon the factual and practical considerations of everyday life upon which the reasonable and prudent men must act. *Brinegar* v. *United States* (1949), 338 U.S. 160; *People* v. *Fiorito* (1960), 19 Ill.2d 246, 166 N.E.2d 606. The factual basis for the arresting officer's

belief that a crime has been or is being committed need not be as persuasive as that necessary for the conviction of a defendant for a crime. *People* v. *Peak* (1963), 29 Ill. 2d 343, 194 N.E.2d 322. Reasonable grounds for an arrest may be supplied by an informer of established reliability. *People* v. *Durr* (1963), 28 Ill.2d 308, 192 N.E.2d 379. Apart from the question of its sufficiency, which will be discussed later, the information received by Anderson came from agents of the Federal Drug Enforcement Administration and the United States Border Patrol. The information was supplied by reliable sources and Anderson and Senece had good reason to rely upon it.

The probative value of the information they obtained by observing the dogs' reaction poses a more difficult problem. At the hearing on the motion to suppress it was stipulated that if the dogs' handlers were called as witnesses they would testify:

> ". . . that these dogs are specifically trained for the purpose of detecting narcotics . . . that their actions in the airport indicated to the handlers, based on their previous experiences with the dogs, that there was narcotics in the suitcases."

Despite this stipulation the defendants contend that the dogs' reliability was not established—they were alerted by only two suitcases although there was marijuana in all nine pieces of luggage; that the dogs could not be cross-examined, the testimony of their handlers was hearsay and there was no evidence as to the basis of their conclusion; that the defendants were thus deprived of their right to the confrontation of witnesses, the assessment of their credibility and the protection of cross-examination.

Because of their keen olfactory sense, dogs for many years have assisted police in tracing human beings and in the detection, pursuit and capture of criminals. With the present day increased traffic in narcotic drugs and the growing menace from their widespread use, dogs have been trained to recognize the scent of these drugs and have been used with much success in their detection. Ju-

dicial acceptance of this detection in the determination of probable cause has been mixed. Illinois appellate courts have not passed on this question directly and courts of other jurisdictions have expressed divergent views.

This is illustrated by the following cases. In *United States* v. *Fulero* (1974), 498 F.2d 748, an employee at a bus station in Arizona notified the local police of the suspicious actions of three men who were shipping two footlockers to Washington, D.C. An officer went to the station and examined the lockers. He smelled the odor of mothballs which he knew was frequently used to conceal the odor of marijuana. He obtained the services of a dog handler and a marijuana-sniffing dog from the Federal Customs Service. The handler brought the dog into the baggage room where there were several pieces of luggage. The dog went immediately to one of the footlockers; he was pulled away, but he returned three times, pawed at it and attempted to chew it. The officer obtained a search warrant, opened the lockers and found 88 pounds of marijuana. The defendant, Fulero, was arrested when he reclaimed the luggage in Washington. He was found guilty of the unlawful possession of marijuana and he appealed, contending that having the dog sniff at his footlockers was an unconstitutional intrusion into them and that there was no probable cause for the issuance of the warrant. The reviewing court called the intrusion argument frivolous, held there was ample probable cause for issuing the warrant and said that the conduct of the police was a model of intelligent procedure.

In contrast, the court in the case of *United States* v. *Solis* (1975), 393 F.Sup. 325, held that the positive reaction of two trained United States customs' dogs to the scent of marijuana coming from the inside of a semi-trailer did not establish probable cause for the search of the trailer. Before conducting the search, the government agents had obtained a warrant which had been issued upon information supplied by an informer and had employed two dogs said to be 100 per cent reliable in detecting narcotic substances. The court, characterizing the

case as one involving the "uninvited canine nose," held the search warrant was defective because the informer was of unproven reliability and that consequently the warrantless search, based as it was entirely on the dogs' reaction, was invalid. In its opinion the court stated that the owner of the fully enclosed trailer had a reasonable expectation that the interior of the vehicle, even though parked at a gasoline station accessible to the public, would be treated as a private place. The court concluded that by employing the olfactory senses of the dogs, the agents gained information substantially equivalent to what they would have acquired had they actually opened the doors and examined the trailer's concealed interior and that this constituted an unreasonable search under the Fourth Amendment.

A dog was also used in the case of *United States* v. *Bronstein* (1975), 521 F.2d 459. In *Bronstein* the court affirmed the denial of a motion to suppress marijuana which was detected in the defendants' suitcases by a marijuana-sniffing police dog. The warrantless search of the suitcases occurred at a Connecticut airport where the two defendants arrived after a flight from California. The defendants' behavior at the California airport attracted the attention of ticket agents who alerted an agent of the Federal Drug Enforcement Administration. The agent had previous experience with the ticket agents and had found them to be reliable informants. The agent relayed the ticket agents' suspicion and the description of the men and their luggage to his Connecticut office. The State police of Connecticut were notified and they, government agents and a trained dog were at the airport when the California flight arrived. Fifty pieces of luggage from the flight were lined up on a conveyor belt which was not moved into the public retrieving area until the dog, termed by the court a "canine cannabis connoisseur," was given the opportunity of sniffing the baggage. The dog vigorously nipped at two suitcases. When the baggage reached the public area two men, who fitted the description received from California, picked up two suitcases each, including one of those identified by the dog. Each man was arrested after he admitted the suitcases he was carrying belonged to him. After some discussion the men agreed to open the bags. Each one of the four bags was found to contain 60 pounds of marijuana, packed in a quantity of moth balls, designed, the court said, to disguise the "pungent and offensive aroma" of the marijuana. The defendants' motion to suppress the evidence was denied. In affirming the denial, the reviewing court noted that there can be no reasonable expectation of privacy when one transports baggage by airplane, stated that the sniffing of the dog was not a search within the meaning of the Fourth Amendment, and held that the use of the dog by agents who had ample reason to pursue the reliable information they had received from California did not render the subsequent search constitutionally suspect. The court concluded that there was probable cause to arrest the defendants and that the search of their suitcases and the seizure of the marijuana did not violate the Fourth Amendment.

There are many similarities between the *Bronstein* case and the present one. The dog in *Bronstein,* like those in this case, did not react to all the suitcases that contained contraband. In *Bronstein,* the marijuana was packed in mothballs, here it was wrapped in small bags surrounded with talcum powder. In both cases the defendants were arrested at airports after arriving from distant states and their arrival was preceded by information received from narcotics agents in those states. However, the information received by the Federal agent in Chicago was much more incriminating than that received by the agent in Connecticut. The latter's information came from a fellow agent, but it rested on the suspicions of airline employees aroused by the actions of the defendants in the California airport and their having four identical pieces of new luggage. The Chicago agent's information came from his associates whose own suspicions were aroused by Ward's prior arrest for the possession of marijuana, by the large amount of cash on his person,

his illegal entry into the United States from Mexico and his surreptitious trips in and out of that country.

Although the information came from trustworthy sources, it was not sufficient, by itself, to justify an arrest. However, it was sufficient to arouse a strong suspicion that a crime was being committed and was sufficient to justify the use of the trained dogs to confirm or remove the suspicion. The defendants were not arrested because of this information, nor were they arrested just because of the dogs' positive reaction to the defendants' luggage. They were arrested because of the information the Federal agent and the Chicago policeman had of the suspicious nature of Ward's activities and because of the confirmation of this suspicion by the reaction of the dogs. Absent either factor, Anderson and Senece did not have probable cause to make an arrest, but the combination of both factors—the information possessed by them and the affirmative response of the trained dogs—established probable cause for arrest.

At this juncture we must differentiate between the defendants. Although there was probable cause to arrest Ward, there was none to arrest Campbell and Myers. The information concerning them was inadequate to justify the use of the dogs or to validate the knowledge acquired from the dogs' behavior. The information received by Anderson inculpated Ward, not Campbell and Myers. The only thing learned about these men before they arrived at O'Hare was that they accompanied Ward from El Paso to San Antonio and that they were with him on a plane bound for Chicago. This would hardly provide a reasonable basis for concluding that they possessed marijuana. Mere presence at the commission of a crime does not constitute culpability (*People* v. *Bracken* (1966), 68 Ill.App. 2d 466, 216 N.E.2d 176) and associating with a person known to have, or reasonably suspected of having, possession of narcotics is insufficient in and of itself to constitute probable cause for an arrest. *Sibron* v. *State of New York* (1968), 392 U.S. 40. Guilt by association is a thoroughly discredited doctrine. *Uphaus* v. *Wyman* (1959),

360 U.S. 72; *People* v. *Ramirez* (1968), 93 Ill.App.2d 404, 236 N.E.2d 284. The only additional thing learned about Campbell and Myers after they arrived at O'Hare was that they retrieved all the luggage including the two suitcases attacked by the dogs. But this additional information was insufficient to reasonably establish that they knew what was in the suitcases. There was no indication that the suitcases belonged to them and it is not unusual for traveling companions to take care of another's bags.

At the time of the arrest, the authorities had no valid information to support their suspicion that Campbell and Myers possessed marijuana themselves, or that they had attached themselves to Ward with knowledge of his criminal design or that they shared with him a common purpose to commit an illegal act. Although subsequent events disclosed their complicity, this was not apparent at the time of their arrest. There was not probable cause for their arrest and the search of any luggage they may have owned was improper.

We use the words "any luggage they may have owned" advisedly, for there was no evidence of any kind as to whose luggage was opened. Based on the report received from Texas and the reaction of the dogs there was substantial reason to believe that Ward's luggage contained contraband and, consequently, there was probable cause for his arrest and the concomitant search of his luggage. However, there was no proof that the two suitcases which were searched belonged to him. For all the record shows, they may have been owned by Campbell or Myers. While the logical supposition would be that some of the luggage was Ward's, it would also be logical to presume, since he was traveling with two companions, that not all of it was his. We have mentioned the similarities between this case and *United States* v. *Bronstein* (1975), 521 F.2d 459, there is however, one crucial difference: in *Bronstein* there was no problem matching the defendants with their luggage since each admitted when questioned by the police that he owned one of the suspected suitcases. Here, neither Ward, nor Campbell and Myers made such an admission, nor were

they asked before being arrested who owned the suitcases marked by the dogs. It is the absence of this connecting link—knowledge on the part of the arresting officers concerning the ownership and control of the bags—that impels affirmance of the trial court's decision.

There was no probable cause to arrest Campbell and Myers and hence the search of any luggage owned or controlled by them was an unjustifiable invasion of their right to privacy. The order of the trial court sustaining their motions to suppress the evidence was correct and it is affirmed. There was probable cause to arrest Ward and a search of his luggage incident to his arrest was proper, but inasmuch as there is no evidence whatsoever in the record that either of the opened suitcases was his property or that he clearly exercised dominion and control over either one of them, the order sustaining his motion to suppress was correct and is affirmed.

JUDGMENT AFFIRMED.

McNAMARA, J., concurs.

McGLOON, *P.J.*, specially concurs:

I agree with the majority's decision to affirm the order of the circuit court of Cook County suppressing the seized evidence, but would follow a different mode of analysis on the question of whether there was probable cause to arrest Ward.

The majority's opinion stands for the proposition of law that a trained dog's alert for narcotics is not a search within the meaning of the fourth amendment and that such a canine alert may be used to establish probable cause for a lawful arrest with the subsequent search and seizure. In my opinion, whenever a trained dog is directed to and sniffs the air adjacent to a closed suitcase to discover concealed contraband contents which are not ascertainable to a human using his natural powers of perception, a constitutionally impermissible search of the suitcase has been made by the dog's policeman handler.

The State argues that the odor the dogs sniffed was a chemical vapor which had emanated from defendants' luggage and was readily accessible to anyone who could smell it. Otherwise worded, the contents of the suitcases were in "plain smell", a variation of the plain view doctrine, so that the defendants had no reasonable expectation of privacy as to the escaping odors. The majority fails to directly address itself to this argument. I believe that whenever an individual successfully conceals the sight and odor of any item from unaided human sensory perception, that individual reasonably anticipates his privacy under the fourth amendment. This concept can be explained by reference to the landmark case of *Katz* v. *United States* (1967), 389 U.S. 347, wherein the court held that the defendant overheard talking on the phone in a public telephone booth had a reasonable expectation of privacy. In that case, the police overheard the conversation via a microphone attached to the phone booth, and the listening was deemed to have been a search even though there was not a physical trespass, since the fourth amendment protects persons and not places. In the instant case, the defendants reasonably expected privacy for the contents of their suitcases, and when the dogs' handlers observed the dogs' reaction at the alert, there was a search of the suitcases and a discovery of the illicit contents therein. As was held in *United States* v. *Davis* (9th Cir. 1973), 482 F.2d 893, 905, it is sufficient that the defendants relied upon the closed suitcases for privacy.

The majority's reliance upon the decision in *United States* v. *Bronstein* (2d Cir. 1975), 521 F.2d 459, indicates that the majority of this Court implicitly adopts the Second Circuit's view that:

> "There can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passenger of dangerous or hazardous freight compels continuing scrutiny of passengers and their impedimenta."

I believe that such a rule is incorrect when applied to the facts at bar. Individuals travelling by airplane are subject to certain limited searches for *weapons and explosives*. If a valid search of weapons and explosives discloses narcotics, the narcotics are considered to be disclosed pursuant to a lawful search. To search only for well-concealed narcotics and then attempt to justify the search under the need for the safety of airline passengers and baggage is in my judgment a misapplication of the law. I believe that the above rule enunciated in *Bronstein* and implicitly adopted by this Court, without limitation and extended to its obvious, logical conclusion, would give *carte blanche* to a police officer with suspicion to intentionally open any item of checked baggage and subject it to a general search.

The issue of consent is closely related to the issue of reasonable expectation of privacy. When an individual travels by air, he is subjected to an unobtrusive magnetometer scan for an amount of metal corresponding to that of a pistol or another metal weapon, and then a frisk for weapons if it is suspected that he is carrying a weapon. Some courts have held that an individual voluntarily passing through a clearly marked magnetometer inspection station consents to a search. Even if this rule is correct, I fail to see how express or implied consent to a *pre-flight* search of an individual and his hand-luggage for concealed skyjacking weapons can be equated with consent to a *post-flight* search for narcotics.

In summary to this point, I believe that the use of the dogs to sniff around the luggage was a search of defendants' suitcases without either probable cause, a lawful arrest, a warrant, or consent. The State argues that the minimal intrusion by the investigating officers aided by specially trained animals is constitutionally permissible. To be sure, the use of dogs of unerring talent to sniff out concealed narcotics is a narrow search, as opposed to a general search. A narrow, unobtrusive search may, nonetheless, be violative of the fourth amendment.

The fourth amendment proscribes unreasonable searches without probable cause, and some carefully limited searches without probable cause have been held reasonable. The most widely recognized reasonable search upon less than probable cause is the stop and frisk procedure described in *Terry* v. *Ohio* (1968), 392 U.S. 1; *People* v. *Lee* (1971), 48 Ill.2d 272, and sections 107-14 and 108-1.01 of the Criminal Code (Ill.Rev.Stat. 1973, ch. 38, pars. 107-14 and 108-1.01), which permit "a carefully limited search of the outer clothing of such person" for weapons. (*Terry* at 30.) The court in *People* v. *Felton* (1974), 20 Ill.App.3d 103, 106, recently explained the three restrictions upon stop and frisk:

> "(1) the stop itself must be justified by specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion: (2) assuming a valid stop, a limited search of the suspect for weapons is justified only if a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger; and (3) the authorized search is confined in scope to an intrusion reasonably designed to discover objects capable of use as weapons."

Upon similar grounds, an unobtrusive pre-flight magnetometer scan has been held to be the type of limited warrantless search approved in *Terry*. I believe that the language and holding in *United States* v. *Epperson* (4th Cir. 1972), 454 F.2d 769, are illustrative:

> "We agree that the use of the magnetometer in these circumstances was a 'search' within the meaning of the Fourth Amendment. By this device a government officer, without permission, discerned metal on Epperson's person. That he did so electronically rather than by patting down his outer clothing or 'frisking' may make the search more tolerable and less offensive—but it is still a search. Indeed, that is the very pur-

pose and function of a magnetometer: to search for metal and disclose its presence in areas where there is a normal expectation of privacy.

"We also agree that the limited search by magnetometer does not fall within any of the recognized exceptions to warrant requirement of the Fourth Amendment except that suggested by *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We think that case controls this one, although the reason in *Terry* for dispensing with the ordinary warrant requirement is not the same as here."

The court went on to state, as in *Terry* and numerous other cases, that the reasonableness of any warrantless search must be determined by balancing the governmental interest in searching against the invasion of privacy which the search entails. "These interests must be balanced at two stages: the search must be 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the interference in the first place.'" (*Epperson* at 771, quoting from *Terry* at 20.) The court found that the governmental interest was the protection of essential air commerce and the lives of passengers, and that the limited magnetometer search was reasonably related to the prevention of skyjacking.

I would suggest in airport search cases that warrantless searches without probable cause are constitutionally permissible only when the protection of human life from danger is at stake. In the stop and frisk cases, the courts always stress that the limited search is permissible only if the policeman reasonably believes that he or another is in danger of attack. Similarly, the airport search cases without exception indicate that the overwhelming need for such searches is the protection of human life.

In the case at bar, I perceive no imminent danger to life or property as would justify a constitutionally permissible search. Nobody's life was in danger when the police officers led the trained dogs through the baggage area. Nobody's property was threatened with imminent

destruction when the police, acting upon mere suspicion, searched by smell the baggage of the lawbreakers and lawabiding alike. Without a valid governmental interest to be balanced against the invasion of privacy, I cannot condone any search, however unobtrusive. Although the apprehension of drug sellers is an important governmental function, it does not rise to the level of protection of human life from attack, and I would hold that a search for drugs by police using trained dogs, based upon an articulable suspicion falling short of probable cause, is prohibited by the fourth amendment.

Since the use of trained dogs to detect concealed narcotics is undeniably a search, I would point out once again that the police herein searched every single piece of baggage unloaded from flight #58. Although all but two pieces of baggage passed the search without alert by the dogs, the fact remains that the bags of innocent persons were unlawfully searched, albeit unobtrusively. Lest we face the terror of constant unobtrusive electronic searches of our persons, homes, and offices without probable cause, I would hold that the use of the trained dogs in the instant case was reprehensible. Although such dogs are invaluable to the Customs Service at border searches, where the fourth amendment does not apply, the domestic use of such dogs should be avoided unless there has already been a lawful arrest or a search warrant.

Docket No. 48292—Agenda 3—March 1977.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellant, v.
DANIEL CAMPBELL *et al.*, Appellees.

MR. JUSTICE UNDERWOOD delivered the opinion of the court:

The defendants, Daniel Campbell, Patrick Myers and Michael Ward, were arrested and charged with the knowing possession of marijuana in violation of section 4 of the Cannabis Control Act. (Ill. Rev. Stat. 1973, ch. 56½, par. 704). Each defendant filed a motion to suppress evi-

dence seized in a search of his luggage subsequent to his arrest. The motions were sustained following a consolidated hearing before the Cook County circuit court. The State appealed, the Appellate Court for the First District affirmed (35 Ill. App. 3d 196), and we allowed the State's petition for leave to appeal.

The events leading up to the arrest of the defendants occurred on February 27, 1974. Dale Anderson, a special agent for the Federal Drug Enforcement Administration, testified at the hearing that sometime after 2 p.m. on February 27 he engaged in a telephone conversation with Agent Robertson of the Administration's San Antonio office. Agent Robertson related that the defendants were due to arrive at O'Hare Airport at 4:30 p.m. on Braniff flight No. 58 from Dallas, Texas. Agent Anderson also related the factual background of this information, testifying that Robertson had received word from Agent Nichols of the Border Patrol that defendant Ward had been stopped trying to enter the country illegally from Mexico. He was carrying $2,700 and had explained he planned to fly to Chicago and then go to Michigan. Ward had previously been arrested in Texas for possession of marijuana, and his name was on a customs lookout list. Subsequently Ward was observed in El Paso, Texas, where he, Campbell and Myers boarded a bus for San Antonio after checking eight suitcases and a footlocker on the bus. In San Antonio, they had boarded Braniff flight No. 58 to Chicago. Anderson verified this information by calling Agent Nichols in El Paso, and then notified the Chicago police that defendants were arriving in Chicago and it was suspected they had marijuana in their luggage. The Chicago police then brought to the airport a canine unit consisting of two German Shepherd dogs and their two handlers. This unit was stationed behind the baggage retrieval area of Braniff at O'Hare. All of the luggage from flight No. 58 was placed behind closed doors in a nonpublic area where each dog was permitted to independently sniff at the luggage. Anderson observed each dog "alert" to the same two suitcases in a manner best

described as an attack upon the two bags. The handlers indicated to Agent Anderson that the dogs' reactions meant that marijuana or a marijuana-like substance was present in the two cases. The parties stipulated at the hearing that "the handlers would testify that they have worked with these dogs on numerous occasions, that these dogs are specially trained for the purpose of detecting narcotics, that they are not used for other police work except for the purposes of narcotic investigations and that their actions in the airport indicate to the handlers, based on their previous experiences with the dogs that there was [*sic*] narcotics in the suitcases."

Donald Senece, a Chicago police officer, observed Ward disembark from flight No. 58 in the company of the other two defendants. Agent Anderson observed Campbell and Myers claim eight suitcases, including the two which had attracted the dogs, and one footlocker and place them on wheeled carts. He did not recall which defendant had the claim checks or which efendant actually touched the suspected suitcases. Ward joined them about 100 yards from the North Central Airlines ticket counter and walked with them to it. As they were about to check in their luggage, all three men were placed under arrest. Anderson opened the two suspect suitcases and discovered the marijuana which the trial court suppressed. The remaining luggage was taken to police headquarters where additional marijuana was found in each piece of luggage. The trial court also suppressed this evidence. The marijuana was wrapped in quadruple bags and heavy talcum powder. No arrest or search warrants had been obtained.

The warrantless arrests of the defendants were proper, of course, if the officers had probable cause, *i.e.*, reasonable grounds to believe the defendants were committing the offense of unlawful possession of marijuana at the time of the arrest. (*People* v. *Robinson* (1976), 62 Ill. 2d 273, 276; *People* v. *Wright* (1969), 42 Ill. 2d 457, 459; Ill. Rev. Stat. 1973, ch. 38, par. 107-2(c).) If the use of the dogs trained in detecting marijuana was permissible here, it cannot be seriously argued that probable cause did not

exist at the time of defendants' arrest. (*Draper* v. *United States* (1959), 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329: *People* v. *Clay* (1973), 55 Ill. 2d 501.) At that point Agent Anderson had been informed by Agents Robertson and Nichols, both of whom were reliable sources, that Ward, a man with a prior drug arrest, had been stopped trying to illegally enter the United States from Mexico, that he had $2,700, and that he planned to fly to Chicago; that, despite being on a custom's lookout list, he had managed to enter this country and was traveling with Myers and Campbell; and that they were carrying eight suitcases and a footlocker and flying to Chicago on Braniff flight No. 58, arriving at 4:30. Agent Anderson had then notified Chicago police that three individuals suspected of carrying marijuana in their luggage were arriving at the airport. As a result, the police brought and used the canine unit. All of this information, including the probable presence in the luggage of marijuana, had been corroborated in detail by the officers at the time the arrests were made.

Defendants urge, however, that the reactions of the dogs to the suitcases should not be considered in determining whether probable cause existed because the use of the dogs constituted an impermissible search unjustifiably invading the privacy of the owners of the luggage; and that probable cause was not established by the remaining facts. While probable cause may have existed apart from the reactions of the dogs (see *United States* v. *Murray* 9th Cir. 1973), 492 F.2d 178, 188, *cert. denied* (1974), 419 U.S. 942, 42 L. Ed. 2d 166, 95 S. Ct. 210), we need not consider that question, since we hold the use of the dogs permissible.

Defendants strenuously maintain that police dogs sniffing the air around their luggage is a search from which they are entitled to fourth amendment protection. They cite only one case so holding, and it was reversed on appeal. (*United States* v. *Solis* (C.D. Cal. 1975), 393 F. Supp. 325, *rev'd* (9th Cir. 1976), 536 F.2d 880.) We have found only one other case expressly holding that the use of trained dogs to detect marijuana constitutes a search,

and that court also held that the search was reasonable although warrantless. (*State* v. *Elkins* (1976), 47 Ohio App. 2d 307, 354 N.E.2d 716.) In contrast, other State and Federal courts have expressly stated that no search occurred. (*Solis; State* v. *Martinez* AVTGFQ, 113 Ariz. 345, 554 P.2d 1272.) It is in our judgment immaterial whether that action is characterized as a search, "a monitoring of the air" (*United States* v. *Solis* (9th Cir. 1976), 536 F.2d 273, 276), and we believe it was. This is the unanimous conclusion in every Federal circuit which has considered the issue.

In *United States* v. *Fulero* (D.C. Cir. 1974), 498 F.2d 748, the court rejected as frivolous the argument that a dog's sniffing of the air around footlockers in a bus terminal was an unconstitutional intrusion. *United States* v. *Bronstein* (2d Cir. 1975), 521 F.2d 459, involved a factual situation virtually identical to ours, and the court concluded that the limited but effective use of the dogs did not create a constitutional issue of substance. In *United States* v. *Solis* (9th Cir. 1976), 536 F.2d 880, a trained dog was used to verify information that a semitrailer parked at a gas station contained marijuana. The court stated that the use of the dogs was not a search, and held such use is reasonably tolerable in our free society. The same result obtains in the first circuit. *United States* v. *Meyer* (1st Cir. 1976), 536 F.2d 963; *United States* v. *Race* (1st Cir. 1976), 529 F.2d 12.

Defendants rely upon *Johnson* v. *United States* (1947), 333 U.S. 10, 92 L. Ed. 2d 436, 68 S. Ct. 367, wherein the Supreme Court indicated that odors alone did not justify a warrantless search. That decision, however, actually supports our conclusion, since the court there went on to say that distinctive odors can be most persuasive evidence of probable cause. (333 U.S. 10, 13, 92 L. Ed. 2d 436, 440, 68 S. Ct. 367, 369.) Moreover, its holding implicitly recognized that no unconstitutional search occurred when the officer smelled the odor of narcotics. It is clear that the detection of narcotics by police smelling the odor is a permissible method of establishing probable cause (*People* v. *Wolf* (1975), 60 Ill. 2d 230; *United States*

v. *Martinez-Miramontes* (9th Cir. 1974), 494 F.2d 808, *cert. denied* (1974), 419 U.S. 897, 42 L. Ed. 2d 141, 95 S. Ct. 176), and we see no significant difference in the use of dogs under identical circumstances. *United States* v. *Bronstein* (2d Cir. 1975), 521 F.2d 459.

Defendants also argue that the uninvited noses of the dogs have intruded into an area where they had a reasonable expectation of privacy (*Katz* v. *United States* (1967), 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507). But they do not explain in what manner the uninvited canine nose is more intrusive than the uninvited human nose in the same location. More importantly, their argument fails since a protectable expectation of privacy must be reasonable and justifiable. (*United States* v. *White* (1971), 401 U.S. 745, 752, 28 L. Ed. 2d 453, 459, 91 S. Ct. 1122, 1126.) Their intent and efforts to so conceal and disguise the odor of the marijuana (which was itself contraband) that its presence in the luggage could not be detected simply does not meet this test. Nor can there be the same expectation of privacy in luggage checked on an airline as exists in one's home or private property. (*Cf. United States* v. *Johnston* (9th Cir. 1974), 497 F.2d 397.) A desire to conceal the odor of contraband hidden in a container exposed to the public is not, in our judgment, entitled to fourth amendment protections any more than in an analogous desire to conceal something in an open field (*Hester* v. *United States* (1924), 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445), in plain view (*Ker* v. *California* (1963), 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623), or otherwise exposed to an individual (*United States* v. *White* (1971), 401 U.S. 745, 28 L. Ed. 2d 453, 91 S. Ct. 1122) or the public (*United States* v. *Hufford* (9th Cir. 1976), 539 F.2d 32).

Defendant Myers refers us to *People* v. *Williams* (1975), 51 Cal. App. 3d 346, 124 Cal. Rptr. 253, where the California Court of Appeals suppressed marijuana discovered when a trained dog "alerted" to a bag in an airline baggage container. That case is not inconsistent with our conclusion, however, for the police in that case had neither

the airline's permission to be in the baggage room nor any information indicating the presence of narcotics. The court carefully distinguished *People* v. *Furman* (1973), 30 Cal. App. 3d 454, 106 Cal. Rptr. 366, where the court found probable cause when the trained dog's reaction corroborated an informant's tip that there might be narcotics in the defendant's suitcase.

It is axiomatic that the fourth amendment protects the guilty as well as the innocent, but that amendment was a reaction to the general warrants and unsupported searches which harassed the early colonists. (*Chimel* v. *California* (1969), 395 U.S. 752, 761, 23 L. Ed. 2d 685, 692, 89 S. Ct. 2034, 2039.) Evidence seized in violation of this amendment is suppressed to deter such conduct, thereby protecting the privacy of innocent persons. (*United States* v. *Janis* (1976), 428 U.S. 433, 446, 49 L. Ed. 2d 1046, 1056, 96 S. Ct. 3021, 3028; *Mapp* v. *Ohio* (1961), 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684; *Weeks* v. *United States* (1914), 232 U.S. 383, 391, 58 L. Ed. 652, 655, 34 S. Ct. 341, 344.) But the use of trained dogs to detect the odor of marijuana poses no threat of harassment, intimidation or even inconvenience to the innocent citizen. Nothing of an innocent but private nature and nothing of an incriminating nature other than the narcotics being sought can be discovered through the dog's reaction to the odor of the narcotics.

The use of trained dogs as a follow-up investigative technique to partially corroborate information received is, in our judgment, a useful, entirely reasonable and permissible procedure. If it be considered an intrusion into privacy, that intrusion is minimal and inoffensive. In this case the procedure employed was limited and exact. It was also objective in that the dogs selected the suitcases containing contraband independently and from among all those on the plane. There was no fourth amendment violation.

The reliability of the dogs is, of course, a crucial consideration, and defendants seek to challenge that reliability because the dogs detected the marijuana in only

two of the nine pieces of luggage. Defendants, however, stipulated the handlers would testify that the reactions of the dogs indicated the presence of marijuana in the two bags. Additionally, it seems to us, the important focus in determining reliability is whether the dogs indicated marijuana existed where it did not, for only then could innocent persons be affected by their use. All the failure to detect it in the other seven containers indicates to us is that defendants were more successful in their efforts to conceal the odor of the marijuana in those pieces of luggage.

Defendant Ward argues the officers at the time of his arrest had no reason to believe the two suspect suitcases belonged to him. As we indicated earlier, however, the totality of the facts then known to the officers established probable cause to assume all three defendants were traveling together and that the luggage containing marijuana was under their joint control.

Finally, it is argued that the warrantless search of the luggage at the airport, and the continuation of that search at the police station was impermissible. Not all warrantless searches are impermissible (*People* v. *Wiseman* (1974), 59 Ill. 2d 45, 48), and one of the exceptions is a search incident to a lawful arrest (*Chimel* v. *California* (1969), 395 U.S. 752, 763, 23 L. Ed. 2d 685, 694, 89 S. Ct. 2034, 2040; *Agnello* v. *United States* (1925), 269 U.S. 20, 70 L. Ed. 145, 46 S. Ct. 4; *People* v. *Williams* (1974), 57 Ill. 2d 239, 243, *cert. denied* (1974), 419 U.S. 1026, 42 L. Ed. 2d 302, 95 S. Ct. 506). The scope of such a search includes the person of the defendant and the area within his immediate control (*Williams; People* v. *Perry* (1971), 47 Ill. 2d 402), and this search falls within this definition (*United States* v. *Edmonds* (2d Cir. 1976), 535 F.2d 714, 720; *United States* v. *Frick* (5th Cir. 1973), 490 F.2d 666, 669, *cert. denied* (1975), 419 U.S. 831, 42 L. Ed 2d 57, 95 S. Ct. 55; *People* v. *McGowan* (1953), 415 Ill. 375, 382; *State* v. *Culver* (Del. 1972), 288 A.2d 279, 283; *People* v. *Perel* (1974), 34 N.Y.2d 462, 315 N.E.2d 452). Additionally, the marijuana for which the police searched

the luggage was directly involved in the offense. This contraband was without question a proper object of search by the police. (*United States* v. *Edwards* (1974), 415 U.S. 800, 805, 39 L. Ed. 2d 771, 777, 94 S. Ct. 1243, 1238; *People* v. *Palmer* (1976), 62 Ill. 2d 261, 263; *People* v. *Jeffries* (1964), 31 Ill. 2d 597, 601; *People* v. *Van Scoyk* (1960), 20 Ill.2d 232, 235; *People* v. *Tillman* (1953), 1 Ill. 2d 525, 532.) Similarly, "[i]t is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." (*United States* v. *Edwards* (1974), 415 U.S. 800, 803, 39 L. Ed. 2d 771, 775, 94 S. Ct. 1234, 1237; *Chambers* v. *Maroney* (1970), 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975; *United States ex rel. Muhammad* v. *Mancusi* (2d Cir. 1970), 432 F.2d 1046, *cert denied* (1971), 402 U.S. 911, 28 L.Ed. 2d 653, 91 S. Ct. 1391; *United States* v. *Robbins* (6th Cir. 1970), 424 F.2d 57, *cert. denied* (1971), 402 U.S. 985, 29 L. Ed. 2d 151, 91 S. Ct. 1674; *People* v. *Wiseman* (1974), 59 Ill. 2d 45, 49; *People* v. *Canaday* (1971), 49 Ill. 2d 416, 421.) The ultimate test, of course, is the reasonableness of the search which was made, not whether the officers could have secured a warrant, and we find no unreasonable conduct here. (*Cardwell* v. *Lewis* (1974), 417 U.S. 583, 595, 41 L. Ed. 2d 325, 338, 94 S. Ct. 2464, 2472; *United States* v. *Edwards* (1974), 415 U.S. 800, 807, 39 L. Ed. 2d 771, 777, 94 S. Ct. 1234, 1239; *People* v. *Wright* (1969), 42 Ill. 2d 457, 460; *People* v. *Jones* (1967), 38 Ill. 2d 427, 434.) Rather, we believe the conduct here constituted commendable police procedure.

The judgments of the appellate and circuit courts are accordingly reversed, and the cause remanded to the circuit court of Cook County with directions to deny defendants' motion to suppress and proceed in accordance herewith.

Reversed and remanded, with directions.

MR. JUSTICE GOLDENHERSH, specially concurring:

Although I find it offensive that the luggage of airline passengers is subjected to this type of "dog sniffing" search, I conclude, with reluctance, that it is not constitutionally impermissible. The record, however, shows a warrantless search at the airport and a continuation of the search at the police station when the luggage had been taken off the luggage carrier, defendants were in custody, and had no access to it. Under these circumstances there was no justification for a warrantless search. This case is strikingly similar to *United States* v. *Chadwick* (1st Cir. 1976), 532 F.2d 773, and I agree with the Court of Appeals for the First Circuit that under *Chimel* v. *California*, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034, this type of warrantless search was unreasonable and unlawful. Had this issue been raised by defendants and argued in the briefs, I would dissent rather than specially concur, but in view of their failure so to do, I reluctantly concur in the result.

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

October 3, 1977

Mr. Jerome Rotenberg
Attorney at Law
Seven S. Dearborn St.
Chicago, Ill. 60603

No. 48292 - People State of Illinois, appellant, vs. Daniel Campbell, et al., appellees. Appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

MOTION TO SUPPRESS EVIDENCE

Now Comes the Defendant, Patrick Myers, by his attorney, Jerome Rotenberg, and moves this Honorable Court to suppress and all evidence illegally seized from the defendant's person, possessions and presents on February 27, 1974, and as grounds therefore shows unto the Court the following:

1. That on or about February 27, 1974, this defendant was arrested by certain police officers of the City of Chicago.

2. That thereafter his person and luggage was searched, and a quantity of marijuana was seized which he believes the prosecution will offer into evidence at the trial of this cause.

3. That the aforemention arrest and search was executed without a search warrant.

4. That the aforementioned search was not made incident to a lawful arrest.

5. That the aforementioned search was not made with the consent of the defendant.

6. That at the time of the defendant's arrest and subsequent search, the police officers did not have probable cause for believing that the defendant had committed or was committing a criminal offense.

7. That the property in question was seized in violation of the defendant's rights pursuant to the Fourth Amendment to the Constitution of the United States and Sections 6 and 10 of Article I of the Constitution of the State of Illinois.

Patrick Myers
By /s/ Jerome Rotenberg
Jerome Rotenberg

Jerome Rotenberg
Attorney for Defendant
7 South Dearborn Street
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RA6-1678

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-903

PATRICK MYERS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT)

BRIEF FOR RESPONDENT IN OPPOSITION

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(ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT)

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court order that petitioner asks this Court to review—which order remands a case for trial—is a final judgment within the meaning of 28 U.S.C., Sec. 1257.

ARGUMENT

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE ILLINOIS SUPREME COURT ORDER THAT PETITIONER ASKS THIS COURT TO REVIEW IS NOT A "FINAL JUDGMENT" WITHIN THE MEANING OF THE APPLICABLE JURISDICTIONAL STATUTE.

Petitioner Myers asks this Court to review an Illinois Supreme Court order that overturns an Illinois Appellate Court ruling and remands the case for trial to the Circuit Court of Cook County (see Petition, at 23a). The procedural effect of the order that petitioner asks this Court to review is to deny the petitioner's motion to suppress evidence on Fourth Amendment grounds and to make the case ripe for trial on the question of guilt or innocence. The Illinois Supreme Court's order, therefore, is not a "final judgment" within the meaning of 28 U.S.C., Sec. 1257, the jurisdictional statute under which petitioner asks this Court to act (see Petition, at 2). This Court, accordingly, should not grant certiorari.

In this case, petitioner moved in the trial court for an order suppressing certain tangible evidence. The motion was granted, and the suppression order entered. This order of the trial court is appealable under Illinois law, see Illinois Supreme Court Rule 604(a)(1), *Ill. Rev. Stat.*, Ch. 110A, Sec. 604(a)(1), and the State of Illinois duly appealed the trial court's order. The Illinois Appellate Court, to which the appeal was taken, affirmed the suppression order. The Illinois Supreme Court later reversed this Appellate Court ruling and entered the remand order that petitioner asks this Court to review here.

Under the present posture of the case, then, petitioner is to be tried on the merits of the charge of possession of marijuana, see *Ill. Rev. Stat.*, Ch. 57½, Sec. 704. And the case is in fact pending at this time in the Circuit Court of Cook County, Illinois. Yet petitioner has asked this Court to render what would amount to an advisory opinion on the question whether the Illinois Supreme Court's ruling on the Fourth Amendment question conflicts with this Court's holding in *United States* v. *Chadwick*, __ U.S. __, 97 S. Ct. 2476 (1977).

On somewhat similar facts, this Court, in *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 67 S. Ct. 1428 (1947), denied certiorari of a California Supreme Court order that remanded a case " 'for a new trial and place[d] the parties in the same position as if the case had never been tried,' " 67 S. Ct., at 1430. The same reasoning applies *a fortiori* in this case, which has never been tried on the merits in a state court. Petitioner might well be acquitted in the Illinois court of the charge of possession of marijuana, and yet he is asking this Court to apply a major Fourth Amendment precedent—the rule of *Chadwick*—to a factual context that has not yet resulted, and may never result, in a criminal conviction. On these facts, the Court, by granting certiorari, would be rendering an advisory opinion of the most extreme sort.

This Court has made it explicitly clear that the rule against advisory opinions is what lies behind the Congressional mandate that the Court's certiorari jurisdiction extends only to final judgments. In *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 73 S. Ct. 749 (1953), the Court said:

> Congress has limited our power to review judgments from state courts lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation. Ordinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final judgment.' [73 S. Ct., at 750-51].

The concerns voiced by the *Pope* Court could very well be realized in this case if the Court were to grant certiorari, since the case—after some ruling by this Court on *Chadwick* grounds—might be susceptible to disposition on some ground entirely distinct from *Chadwick* or from any Fourth Amendment question.

The petitioner might well have a good defense arising from some rule of Illinois evidentiary or procedural law. In his certiorari petition here, petitioner gives no hint of a willingness to abandon all possible defenses other than the *Chadwick* claim. Petitioner, then, does not come within the holding of *Pope, supra*, in which the Court, despite its concern over the "finality" of the judgment, granted certiorari on the strength of the "explicit and free" concession made by the petitioner in that case that "his case rests upon his federal claim and nothing more," 73 S. Ct., at 751. No similar concession could be read into the instant petition, even assuming that it would be advisable for this Court to attempt to do so.

This Court has said that the test of the "finality" of judgment under 28 U.S.C. 1257 is that the judgment "must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entering the judgment which the appellate court . . . directed,' " *Gospel Army* v. *City of Los Angeles*, 331 U.S. 543, 67 S. Ct. 1428, 1430

(1947). The Illinois Supreme Court order that petitioner asks this Court to review, does not fully determine the rights of petitioner and of the State of Illinois, and the Circuit Court of Cook County has far more to do than simply enter a judgment directed by the Illinois Supreme Court: the trial judge must proceed to conduct a trial of the case unless the case can be disposed of by some manner short of trial.

The Illinois Supreme Court's order is, in short, an interlocutory one, and, under Illinois law, "no appeal lies from an interlocutory order in the absence of a statute or rule specifically authorizing such review," *People* v. *Miller,* 35 Ill. 2d 62, 67, 219 N.E. 2d 475, 478 (1966), see *Bulk Terminals Company* v. *Environmental Protection Agency,* 65 Ill. 2d 31, 357 N.E. 2d 430, 433 (1976). Petitioner can point to no Illinois statute or rule authorizing an appeal from an order denying a motion to suppress evidence, for no statute or rule exists. And, as respondent pointed out at the outset, *supra,* at 1, the Illinois Supreme Court's order here is functionally indistinguishable from a trial court order denying a defendant's motion to suppress evidence in any garden-variety narcotics prosecution.

CONCLUSION

Because the order that petitioner asks this Court to review is not a final judgment within the meaning of 28 U.S.C., Sec. 1257, this Court should deny the petition for a writ of certiorari, and respondent accordingly asks that this Court duly deny the petition.

Respectfully submitted,

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No. 77-903

In the
Supreme Court of the United States
October Term, 1977

PATRICK MYERS,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

(On Petition for a Writ of Certiorari to the Supreme Court of Illinois)

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for a Writ of Certiorari to the Supreme Court of Illinois)

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

ARGUMENT

THE ORDER OF THE SUPREME COURT OF ILLINOIS IS A "FINAL JUDGMENT" WITHIN THE MEANING OF TITLE 28, UNITED STATES CODE, SECTION 1257.

The respondent's argument that the order of the Illinois Supreme Court which remanded the cause to the Circuit Court of Cook County with directions to deny

the motion to suppress is not a final judgment within the meaning of Title 28, United States Code, Section 1257, is without merit. The case at bar falls within those categories of cases discussed by this court in *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029 (1975).

In the case at bar in the event this court were to refuse to take jurisdiction of the federal question as to whether petitioner's right pursuant to the Fourth Amendment were violated, he would not be able to again present his federal claims for review. Illinois law precludes him from renewing his motion to suppress in the trial court absent a showing of exceptional circumstances or the availability of additional evidence, *People* v. *Holland,* 56 Ill.2d 318, 307 N.E.2d 380 (1974).

If he is tried on the merits in the trial court and is convicted, he would not be able to question the legality of his Fourth Amendment issue in the state appellate process for the reason that the Illinois Supreme Court has already decided this issue and directed the trial court to deny the motion to suppress. Thus the review of his federal claim in this court could never be obtained.

The highest court of Illinois has rendered a final decision on the federal question in the case at bar and whatever proceedings remain to come in the state court do not affect the federal issue involved here. However, if this court were to decide the federal question in petitioner's favor, all proceedings would be terminated inasmuch as the petitioner could not be tried if the evidence that is the subject of the pending charge is suppressed.

CONCLUSION

Wherefore, for the foregoing reasons and those previously asserted, the petition for a writ of certiorari to review the judgment of the Supreme Court of Illinois should be granted.

Respectfully submitted,

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